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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PHARMACIE NOUVELLE, INC., Plaintiff and Appellant, v. A&G WILSHIRE, LLC, et al., Defendants and Respondents.	B199590 (Los Angeles County Super. Ct. No. BC333017)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Affirmed.

Swanson Law Firm and Julia Swanson for Plaintiff and Appellant Pharmacie Nouvelle, Inc.

Huskinson and Brown and Paul E. Heidenreich; Bernard & Bernard, Stephen Bernard and Ernest Vojdani for Defendants and Respondents A&G Wilshire, LLC and Artisto Vojdani.

Pharmacie Nouvelle, Inc. appeals from the judgment entered following a jury verdict in favor of A&G Wilshire LLC (A&G) and Aristo Vojdani in Pharmacie Nouvelle's action for breach of contract and negligent misrepresentation arising from its lease of space in A&G's building to open an upscale boutique pharmacy offering natural and homeopathic products. Pharmacie Nouvelle, whose lawsuit sought millions of dollars in lost profits resulting from A&G's alleged failure to provide promised parking under the building, challenges several of the trial court's evidentiary rulings, as well as the court's award of attorney fees and costs to A&G and Vojdani. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Tricia Grose, the owner and chief executive officer of Pharmacie Nouvelle, operated two herbal pharmacies in Northern California in the late 1980's and was also the owner and operator of Herbaceuticals, Inc., a company distributing natural products through nationwide retail chains like Whole Foods and Trader Joe's. In early 2002 Grose decided to open an upscale boutique pharmacy in Beverly Hills to sell herbal pharmaceutical and skin care products and approached Vojdani, an A&G principal and the operator of Immunosciences Lab, Inc., about leasing space in A&G's building. According to Grose, Vojdani solicited her to lease space in the building "because of the symbiotic relationship that would be created between [Vojdani's] laboratory testing facility and [the future pharmacy's] proposed holistic pharmaceutical operations." Grose visited the building on several occasions and was shown the building's garage, which is, and was at the time, a covered structure on the first floor containing 22 tandem spaces accessible through a gate operated by remote control devices.

After Grose decided to lease the office space, a lease agreement was executed on her behalf by her former husband, David Tenenberg, in February 2002 for two suites located on the first floor of the building and the third-floor penthouse suite. The

agreement also granted the tenant the opportunity to lease four parking spaces at a monthly rate of $80 each.[1]

Grose began renovating the space soon after the lease was signed and paid rent for the suites until May 2003 when the lease expired. Renovations proceeded slowly, and Grose herself experienced health problems that further delayed the renovation. She continued to pay rent on the suites as a holdover tenant until November 2004 when she retained counsel to negotiate a modified lease with A&G. At that time, her counsel was provided with copies of a minor accommodation permit issued by the City of Beverly Hills in March 2000, which requires a parking attendant to be "on-site" during business hours. The modified lease, which was drafted by Grose's counsel and substituted Pharmacie Nouvelle as the tenant, retained the original provisions concerning parking spaces and extended the term of the lease through December 31, 2006. The modified lease also added a paragraph providing, "The parties agree that should the Lessee determine that the four (4) parking spaces . . . are insufficient for its needs, then the parties shall meet within five (5) days of Lessee's request to the Lessor to discuss Lessee's additional parking space requirements. The parties will consider hiring a parking attendant to manage the parking lot. The associated cost will be shared by the parties in the amounts they agree upon, providing however, that the Lessor shall not be responsible to pay more tha[n] $500 per month through December 31, 2006."

In early 2005, after completion of the renovation, Grose demanded that Vojdani provide her with new remote control devices for the garage gate and asked that the gate be left open to accommodate her prospective customers. She also complained she could not operate her retail business utilizing the tandem parking spaces provided. When A&G resisted her requests, she retained counsel to reinforce her request and, apparently for the first time, argued the minor accommodation permit required A&G to hire a full-time parking attendant for the garage. Vojdani, after checking with the City of Beverly Hills

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[1] Two months later, in April 2002, Tenenberg assigned his rights under the lease to Grose and Herbaceuticals, Inc. At the time the lease was executed, Grose had not formed Pharmacie Nouvelle. Pharmacie Nouvelle was subsequently incorporated in 2003.

to determine the meaning of the provision, refused to hire a parking attendant and advised Grose A&G had complied with the permit by designating an on-site employee to monitor the parking garage.

In May 2005 Pharmacie Nouvelle sued A&G and Vojdani, alleging claims for breach of contract, fraud, negligent misrepresentation, negligent interference with prospective economic advantage, intentional interference with contract and unfair competition. The complaint sought more than $3 million in damages and lost profits based on A&G's purported failure to provide promised parking to the fledgling company. A&G cross-complained for past-due rent and parking charges, claims that were dismissed before trial.

At trial Pharmacie Nouvelle sought to prove its claims by presenting evidence of Grose's experience in the natural pharmaceutical products industry and projections for the profits it had expected to generate from its business, expert testimony that the minor accommodation permit required A&G to provide a full-time parking attendant located in the garage to service parking needs and expert testimony confirming the necessity of parking to support a retail business. A&G and Vojdani moved to exclude Pharmacie Nouvelle's evidence of lost profits as speculative and much of the proposed expert testimony as improper opinion. A&G and Vojdani defended the case primarily on the ground Pharmacie Nouvelle's losses resulted not from parking issues but from construction delays and Grose's distraction with health problems and extensive travel.

In a special verdict the jury found A&G had not breached the lease but A&G and Vojdani had made a material misrepresentation to Pharmacie Nouvelle.[2] Nonetheless, the

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[2] It is far from clear what fact the jury concluded A&G and Vojdani had misrepresented. Pharmacie Nouvelle argued they had not made clear to Grose that the parking garage would be closed during the day and accessible only by using a remote control device. Further, Pharmacie Nouvelle claimed Grose was never told she would have tandem, rather than single, parking spaces. Finally, Pharmacie Nouvelle argued A&G and Vojdani had failed to advise Grose of the minor accommodation permit requirement of a parking attendant on-site. The record reveals, however, Pharmacie Nouvelle was in possession of the minor accommodation permit at the time it entered into the modified lease.

jury concluded Pharmacie Nouvelle's reliance on A&G and Vojdani's misrepresentation was not a substantial factor in causing harm to Pharmacie Nouvelle. Following the verdict, the trial court awarded $156,175.35 in attorney fees to A&G and Vojdani under Civil Code section 1717.

CONTENTIONS

Pharmacie Nouvelle contends the trial court erred in excluding evidence of its potential lost profits, as well as expert testimony regarding the importance of parking to the success of a business and the meaning of the minor accommodation permit. Pharmacie Nouvelle also contends the trial court abused its discretion in failing to appropriately apportion attorney fees awarded to A&G and Vojdani.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Excluding the Challenged Testimony*

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 196-197 ["In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion."]; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 ["appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"]; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 885 ["[w]e review a trial court's decision to admit or exclude evidence under the abuse of discretion standard"]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476 [same].)

a. *The jury's finding of no causation renders moot the issue whether the court properly excluded evidence related to Pharmacie Nouvelle's lost profits*

In its opening brief Pharmacie Nouvelle challenges the court's ruling excluding evidence of the profits Pharmacie Nouvelle contends it would have generated had it been able to open as planned. A&G & Vojdani correctly contend this issue is moot because of the jury's findings that A&G had not breached the lease agreement and that A&G and

Vojdani's actions did not cause Pharmacie Nouvelle to delay its opening. Pharmacie Nouvelle argues we should reach this issue in the event the case is retried. We decline that invitation in light of our affirmance of the judgment.

b. *The trial court properly excluded Pharmacie Nouvelle's proposed expert testimony on the importance of parking and the meaning of the minor accommodation permit*

"As a general rule, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).) Additionally, in California, '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (Evid. Code, § 805.) However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 (*Summers*); accord, *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972.) "'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.'" (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.)[3] Likewise, "'questions of law are not "to be decided by the trier of fact"; rather it is for the judge, not the lawyers or the

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[3] As explained in *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291-292, expert opinion should be excluded "'"when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'"'" An expert may not offer opinions about the weight or significance of particular evidence (in that case, an employer's retaliatory motive) because, instead of assisting the jury in its factfinding process, such testimony would create "an unacceptable risk that the jury paid unwarranted deference to [the witness's] purported expertise when in reality he was in no better position than they were to evaluate the evidence." (*Id.* at p. 293.) The *Kotla* court concluded that, without some reference by the expert to some professionally recognized "general formula, framework, or theory utilized specially by human resources experts" (allowing the employer's actions in a particular set of circumstances to be objectively evaluated), there was no basis to conclude the expert could offer any significant assistance to the jury in weighing the evidence about the employer's motive. (*Id.* at p. 294.)

witnesses, to inform the jury of the law applicable in the case and to decide any purely legal issue.'"[4] (*Summers*, at p. 1182.)

Relying on these principles, the trial court granted A&G and Vojdani's motions in limine challenging two expert opinions Pharmacie Nouvelle sought to introduce at trial: (1) the testimony of its expert on specialty retailing that the building's inadequate parking was a major impediment to the opening of the new business; and (2) the testimony of a lawyer as to the meaning of the minor accommodation permit provision requiring a parking attendant to be on-site at the building. Neither ruling constituted an abuse of discretion.

Any juror who had ever experienced a lack of parking as an impediment to visiting a particular store -- a nearly universal occurrence in Los Angeles County -- was able to draw on that experience in determining whether a lack of parking caused Pharmacie Nouvelle's business woes. (Cf. *Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 458 ["[i]n this day and age in southern California, where virtually every citizen either drives or rides in a vehicle, no expert testimony is necessary to support the reasonable inference that [plaintiff] would have suffered less injury if he had been wearing a seat belt"]; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 732 [reversing judgment premised upon expert testimony that sidewalk defect was trivial; "[i]t is well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous"].) Under the facts of this case, we cannot say the court abused its discretion

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[4] Evidence Code section 805 "does not . . . authorize an 'expert' to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence." (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841; see also *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650, 664.) "[E]ven lawyers may not testify as to legal conclusions, or '"state interpretations of the law, whether it be of a statute, ordinance or safety regulation promulgated pursuant to a statute [citations]."' [Citations.] . . . '"The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion."'" (*WRI Opportunity Loans II LLC v. Cooper* (2007) 154 Cal.App.4th 525, 532, fn. 3.)

in excluding the testimony as it constituted little more than the expert's vouching for the desired outcome.[5]

The same rationale applies to the proposed testimony by a lawyer that the minor accommodation permit required A&G to have a parking attendant located in the garage during business hours. In proffering this opinion Pharmacie Nouvelle sought to neutralize the testimony of a Beverly Hills planning administrator that, as historically enforced by the City, the building owner was required to maintain a parking attendant *on-site* but was not forced to ensure the continuous presence of the attendant in the garage. At trial, the jury was provided with the language of the permit and heard the testimony of the City administrator and Vojdani, the building owner and operator. It was within the jury's province to apply the law to the facts and determine whether A&G's conduct was in violation of the permit. As the *Summers* court cautioned, "the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title 'expert,' is more knowledgeable than the judge in a given area of the law. [Citation.] . . . Thus, there is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision." (*Summers, supra*, 69 Cal.App.4th at p. 1182.)

2. *The Trial Court Did Not Abuse Its Discretion in Apportioning Attorney Fees*

An order granting an award of attorney fees is generally reviewed for an abuse of discretion. (See, e.g., *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397; *Salawy v. Ocean Towers Housing Corp.* (2004) 121

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[5] While we can conceive of situations under which the impact of specific parking restraints might properly be the subject of expert testimony, this is not such a case. As discussed, the jury found A&G and Vojdani had not breached any contractual obligation owed Pharmacie Nouvelle and also found whatever misrepresentations occurred did not cause the failure of Pharmacie Nouvelle's business. According to Grose's testimony, the actionable misrepresentations were made well before the contract was modified to specifically address Pharmacie Nouvelle's parking needs, leading us to question why the issue of prior misrepresentation was allowed to proceed to the jury. In any event, the inherent inconsistency of Pharmacie Nouvelle's theory of the case makes it difficult to second-guess the trial court's exercise of discretion with respect to this particular evidence.

Cal.App.4th 664, 669.) In particular, "[w]ith respect to the *amount* of fees awarded, there is no question our review must be highly deferential to the views of the trial court." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [recognizing trial court's broad discretion in determining amount of reasonable attorney fees because experienced trial judge is in the best position to decide value of professional services rendered in court].) An appellate court will interfere with a determination of "what constitutes the actual and reasonable attorney fees" "only where there has been a manifest abuse of discretion." (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228.)

Pharmacie Nouvelle's contention the trial court abused its discretion by failing to apportion fees related to A&G and Vojdani's defense of Pharmacie Nouvelle's tort claims and the fees related to its breach of contract claims lacks merit.[6] "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action. . . . [¶] Conversely, . . . '[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130; see *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 ["[a]pportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units"]; accord, *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.)

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[6] Attorney fees were awarded pursuant to Civil Code section 1717, subdivision (a), which provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court[] and shall be an element of the costs of suit."

In awarding fees to A&G for its successful defense of the breach of contract claim, the trial court noted the complexity of the case and the contentious nature of the trial, which was preceded by lengthy discovery and motion practice. It also acknowledged that the entire case "arose out of the breach of contract" and observed that apportionment of fees related to the other claims would be difficult. Notwithstanding these difficulties, the court reviewed the hourly bills submitted by A&G and Vojdani and struck approximately $30,000 (or roughly 16 percent) from their request. That exercise of judgment is entrusted in the first instance to the wide discretion of the trial court. (See *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1365 [apportionment is within the trial court's discretion]; *Bell v. Vista Unified School Dist., supra,* 82 Cal.App.4th at p. 687.) We are unwilling (and, indeed, not empowered) to substitute our own opinion on apportionment, reviewing only a cold record, for the evaluation made by the experienced judge who presided at the trial. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 ["'[t]he burden is on the party complaining to establish an abuse of discretion and unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power'"]; see also *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083 [abuse of discretion in apportionment of fees is established only when trial court's ruling exceeds bounds of reason, considering all the circumstances before it]; *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 479 [same].)

DISPOSITION

The judgment is affirmed. A&G and Vojdani are to recover their costs on appeal.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.